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TABLE OF AUTHORITIES

CASES:

Nos. 72–1490 and 72–1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

FEDERAL POWER COMMISSION, *ET AL.*,
Petitioners,

v.

TEXACO INC., *ET AL.*,
Respondents.

On Petitions for Writs of Certiorari
To The United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE RESPONDENT, PHILLIPS PETROLEUM COMPANY, IN OPPOSITION

Phillips Petroleum Company ("Phillips"), one of the Respondents in this case, files this brief in opposition to the petitions for *certiorari* lodged in Case No. 72-1490 by the Solicitor General, on behalf of the Federal Power Commission ("Commission"), and in Case No. 72-1491 by Dudley T. Dougherty, *et al.*, Co-Executors of the Estate of Mrs. James R. Dougherty, *et al.* ("Dougherty").[1]

[1]For convenience, when this brief in opposition refers to "Commission" it may also be understood to refer to Dougherty where appropriate in light of the context.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-22a)[2] has recently been reported at 474 F.2d 416 (1972). The initial Order of the Commission, designated Order No. 428 (App. 29a-46a), is reported at 45 FPC 454 (1971); amendatory Orders, designated Order Nos. 428-A (App. 47a-49a) and 428-B (App. 50a-84a), are reported at 45 FPC 548 (1971) and 46 FPC 47 (1971), respectively (said Orders will sometimes be referred to collectively as "Orders").

QUESTIONS PRESENTED

1. Whether this Court should review a decision holding that, while the Commission may utilize appropriate methods to relieve small producers from certain regulatory burdens, the Commission may not adopt a method which both omits and precludes the statutory application of the "just and reasonable" rate standard of Section 4 to certain jurisdictional sales.

2. Whether this Court should review a decision holding that, while the Commission has power under Section 16 of the Natural Gas Act to classify persons and to issue and promulgate administrative rules and regulations "to carry out" the provisions of the Act, but "for the purposes of its rules and regulations," such power does not include the *legislative* power to *narrow* the applicability of the statutory "just and reasonable" rate standard of Section 4 in clear contravention of the express mandate of Congress.

3. Whether this Court should review a decision setting aside Commission Orders which nullify express statutory mandates especially when the Commission has developed methods (discussed approvingly by the Court below) of achieving its intended goals *within* the framework of the Act.

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[2] "App." refers to the Appendix to the Commission's petition for certiorari.

STATEMENT OF THE CASE

The facts of this case are ably and concisely stated in the decision of the Court below (App. 1a-22a). Accordingly, Phillips will not comment further on those facts except to point out certain areas in which the Commission's Petition may have left a mistaken impression.

The Commission states that in its Orders it took action "* * * to establish a procedure whereby each small producer could obtain a blanket certificate to cover all existing and future sales * * *" (Petition, p. 7). And it characterizes the decision of the Court below as follows (Petition, p. 8):

> "On petitions for review, the court of appeals, with one judge dissenting, set aside the Commission's orders establishing a blanket certificate procedure for small producers (App. A, *infra*, pp. 1a-22a). The court concluded that, by authorizing blanket certificates for small producer sales, the Commission had abdicated its statutory responsibilities under Sections 4 and 5 of the Act . . . to insure that small producer rates will be 'just and reasonable' * * *."

It seems to Phillips that the above-quoted references may imply that the novelty of the Orders is the blanket certificate procedure -- that it was the blanket certificate idea *per se* which the Court held unlawful. That is not so. The blanket certificate approach for small producer sales was established by the Commission and approved by this Court in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

What must be carefully noted is that the Orders went *beyond* the *Permian* blanket certificate procedure. Under the blanket certificate procedure approved in *Permian*, small producers were relieved of filing requirements, but only so long as their sales were made at or below the just and reasonable area rate fixed by the Commission.[3] Here, however, as the

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[3] Area Rate Proceeding, *et al.*, Opinion No. 468, 34 FPC 159, 234-36 (1965); Order No. 308, Docket No. R-279, 34 FPC 1202 (1965).

Commission conceded (App. 14a), its Order "* * * does not purport to determine the just and reasonable rates for sales by small producers." The Orders here would permit small producers to charge their contract rates (App. 43a), regardless of the just and reasonable area rate, without any prior review of either the contract or the contract rate by the Commission.

Further, since the orders would have allowed exaction of unreviewed contract rates by small producers without any obligation to refund overcharges in excess of a subsequently determined just and reasonable rate, the Orders would have forever insulated those (past) sales from regulation under the just and reasonable standard. Indeed, as the Court pointed out, if the Commission had left even the potential for future review under the just and reasonable standard of Sections 4 and 5 of the Natural Gas Act ("Act")

> "* * * we might have a different case. * * * However, the Commission here abandoned *any* future rate review under the 'just and reasonable' standard * * *" (App. 13a at note 21; emphasis in original).

The Commission's Petition also states that the holding of the Court below was "* * * that the Commission may not rely on market factors in reviewing the lawfulness of small producer rates * * *" (Petition, p. 12). Dougherty raises the same point (Petition, pp. 9-10). With all due deference to Petitioners, that was *not* a holding of the Court below as we point out in our argument.

Another fact should also be noted. The Court below indicated that the Commission is free to determine "just and reasonable" rates for small producer sales which are higher than the just and reasonable area rates that apply to sales of other producers (App. 16a). The Court said that "* * * [g]iven the special problems and practices of small producers, such a result is certainly conceivable * * *" *(ibid.)*.

Also, the Court discussed approvingly Order Nos. 455

and 455-A,[4] orders issued by the Commission after the Orders under review (App. 13a). Order Nos. 455 and 455-A, which expressly apply to small producers (and others), promulgate optional procedures by which the Commission, before a sale begins, will act to approve or disapprove contracts proposing rates that exceed current area rates. Under the optional procedure, before the sale is certified the Commission will determine whether the specified (present and future) contract prices in excess of area rates "* * * are just, reasonable and required by the present and future public convenience and necessity," the Standards of Sections 4 and 7, respectively (Appendix A, *infra*, p. 32a). The Court said that such a procedure appears to comport more with the Act than the small producer Orders which preclude review under the just and reasonable standard (App. 13a).

ARGUMENT

There is no question raised by the Petitions warranting the grant of *certiorari*. The alleged importance of this case as represented by the Commission and Dougherty derives solely from incorrect interpretations of the decision and the failure of Petitioners to recognize other administrative remedies – most already available – to provide almost the same relief to small producers without abandoning the "just and reasonable" standard.

1. Commission in its Petition (pp. 12-14) tries to create the illusion of importance for this case by saying that the Court of Appeals held that the Commission may not rely on market factors in reviewing the lawfulness of small producer rates in the context of pipeline rate proceedings. The Court said no such thing. It held only that at *some* point in time there must be an application of the "just and reasonable" standard to the small producers' rates.

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[4]Order Nos. 455 and 455-A, issued in Docket No. R-441 on August 3, 1972 and September 8, 1972, respectively, are published at 37 F.Reg. 16188 and 37 F.Reg. 18721, respectively. For convenience, they are printed in Appendix A and Appendix B to this brief, infra.

The Commission ignores the fact that the Court carefully refrained from attempting to prescribe the content of the just and reasonable standard. The Court rejected the Commission's plan, not because market forces were or would be considered in fixing "just and reasonable" rates for such sales, but because the "just and reasonable" standard had been abandoned altogether. Thus, it said:

> "* * * As the court noted in *City of Detroit*, a new Commission approach to regulation is not invalid merely because it departs from the traditional rate-base or cost-of-service methods. However, even granting the legitimacy of indirectly regulating small producer rates, the standards set forth in Order No. 428 have not been demonstrated to have *any relationship at all* to the statutory standard" (App. 12a, footnote 20, emphasis supplied).

Further the Court did not forbid the use of market factors by the Commission, but it noted that the Commission by its Orders was proposing to use brand-new tests nowhere to be found in the Act[5] instead of the statutory "just and reasonable" standard. Resort to such non-statutory standards does not satisfy the congressional mandate that the just and reasonable standard be applied.

There is then no issue as to what the Commission may or may not consider in fixing just and reasonable rates for jurisdictional small producer sales. The issue raised by the Orders was whether the Commission can lawfully refuse to apply the "just and reasonable" standard at all. And as to that issue, the Court said it cannot: Section 4 requires that

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[5] "* * * The novel tests proposed are nowhere spelled out in the Act or in any decision applying the Act. Small producer rates can only be passed along to consumers if they are not

> unreasonably high, considering appropriate comparisons with *highest contract prices* for sales by large producers *or* the prevailing market price for *intrastate* sales in the same producing areas" (App. lla; emphasis in original).

"[*a*]*ll* rates and charges made . . . by *any* natural-gas company . . . shall be just and reasonable, and *any* such rate or charge that is not just and reasonable is hereby declared to be unlawful."[6]

2. The Commission also tries to create an importance for this case by stating that the Court of Appeals has not given a broad enough scope to the Commission's power to classify under Section 16 of the Act. It states its disagreement with the Court's conclusion that the Orders misuse Section 16 (Petition, p. 11) and then goes on to argue, without any further reference to Section 16, that somehow the substantive standards of the Act would still be applied under its Orders (*id.*, pp. 11-12).

We have just seen that the Court of Appeals rejected the Orders because they do not provide for application of the just and reasonable standard of Section 4. Further, as to the Commission's belated suggestion that Section 5 of the Act would be used to order prospective rate reductions (Petition, p. 12), it should be noted that even if the Section 5 remedy were available under the wording of the blanket certificate provisions,[7] there is still no answer to the Court's objection that purchasers who have been charged illegal rates could never be reimbursed for past excess charges (App. 15a).[8]

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[6]15 U.S.C. §717c(a), emphasis supplied.

[7]In view of the Commission's assurance that "[s]mall producers certificated hereunder shall be authorized to make small producer sales nationwide pursuant to existing and future contracts at the price specified in each such contract" (App. 43a), the subsequent availability of the Section 5 remedy may not be free from doubt. See, *e.g.*, United States v. Seatrain Lines, 329 U.S. 424 (1947).

[8]Significantly, even Judge Fahy in dissent concluded that he would * * * strike its [the Order's] provisions prohibiting refunds to pipelines and large producers, leaving open to the Commission to exercise such authority as it has to protect large producers and pipelines in the event the Commission finds they have been charged unreasonably high prices by small producers * * *" (App. 22a).

Since the Orders freed small producers from refund obligations (App. 5a, 37a), the just and reasonable standard of Section 4 would *never* be applied to some jurisdictional sales.

What is important, in addition, is that there is no conflict between the Court's holding with respect to the Section 16 power to classify and the Section 4 and 5 obligations to set just and reasonable rates. The Commission's brief tries to create such a conflict but fails in the face of the Court's insistence that Section 16 of the Act be used, not to create exemptions, but only in order "* * * 'to carry out the provisions of this chapter,' * * *" that is, "* * * for implementation of the core sections of the Act, such as Section 4" (App. 10a).

The holding of the Court of Appeals is really very straightforward concerning the core sections of the Act:

> "The Commission has a duty to insure that all rates are 'just and reasonable.' At best, the indirect controls it has proposed will insure that the small producer rates which are passed on to consumers are below levels set by private contracting parties (or potentially by state regulation which is not necessarily tied to the federal standard). Nothing at all insures that those levels will be 'just' or 'reasonable.' *That is the essential flaw in the Commission's plan.* That is the point at which the FPC abdicates its regulatory responsibility in derogation of the purposes and mandatory terms of the statute. Indirect 'regulation' by such novel 'standards' is worse than an exemption simpliciter. Such an approach retains the false illusion that a government agency is keeping watch over rates, pursuant to the statute's mandate, when it is in fact doing no such thing" (App. 12a-13a, emphasis supplied).

3. The decision below does not merit review for the additional reason that administrative remedies are already available which afford nearly all of the relief to small producers contemplated by the Orders, but within the framework

of the Act. Since they are available without sacrificing the "just and reasonable" standard, obviously the Commission's attempted justification of its Orders on the basis of the gas supply shortage or any other rationale must be rejected. We shall briefly review these administrative remedies in our remaining comments.

First, the blanket certificate procedures approved by this Court in *Permian, supra,* have been made available in other pricing areas as well.[9] This approved blanket certificate procedure, which can easily be further expanded to include the few parts of the nation not already included, allows small producers to make jurisdictional sales at or below just and reasonable area rates under blanket certificates without making the normal individual rate or certificate filings.

Second, the Court suggested that the Commission is free to fix just and reasonable rates for small producers which are higher than just and reasonable rates for other producers (App. 16a). The benefits of such higher rates can be quickly accorded to small producers as the Commission itself has demonstrated through procedures it has recently employed. Thus, such rates could be established promptly under the *rulemaking* procedures being used by the Commission for fixing "just and reasonable" producer rates,[10] which procedures were recently affirmed by the United States Court of

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[9]Area Rate proceeding (Southern Louisiana Area), Opinion No. 598, as amended, 46 FPC 86 (1971), affirmed, Placid Oil Company v. Federal Power Commission, F.2d (5th Cir. No. 71-2761, decided April 16, 1973); Area Rate Proceeding (Hugoton-Anadarko Area), Opinion No. 586, 44 FPC 761 (1970), affirmed, California v. Federal Power Commission, 466 F.2d 974 (9th Cir. 1972); Area Rates for the Appalachian and Illinois Basin Areas, Order No. 411, 44 FPC 1112 (1970); Area Rate Proceeding (Other Southwest Area), Opinion No. 607, as amended, 46 FPC 900 (1971), appeal pending, Shell Oil Company v. Federal Power Commission (5th Cir. No. 72-1114).

[10]Area Rates for the Appalachian and Illinois Basin Areas, Order No. 411, 44 FPC 1112 (1970).

Appeals for the Tenth Circuit.[11] A recent example illustrating the speed of these new ratemaking procedures is in the Commission's Docket No. R-389-B wherein, on April 11, 1973, the Commission gave notice that it would fix a nationwide "just and reasonable" rate for new gas sales by July 1, 1973.[12]

Finally, it is plain from the decision that the Court was favorably impressed with the so-called optional certificate procedure which is already available under the Commission's regulations.[13] Producers desiring to make jurisdictional sales at rates exceeding area rate levels may file applications for certificates under the optional certificate procedure. Commission approval of such applications will be after scrutiny of the sale under both the just and reasonable standard of Section 4 and the public convenience and necessity standard of Section 7. Such optional certificates, when granted, will approve the higher contract rates over the life of the contract under both statutory standards.

As the following excerpt makes clear, the optional certificate procedure, including application of the just and reasonable standard, was represented by the Commission to be the *most* it can do under the Act to assure independent producers that they will be able to collect their contract prices:

> "24. To those who have commented on our rulemaking to suggest that we exceed our authority in contemplating permanent certification of producer sales at firm rates not subject to refund or

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[11] "Notice Instituting Proposed Rulemaking and Order Prescribing Procedure," Docket No. R-425, issued July 15, 1971, 36 F.Reg. 13621, affirmed, Phillips Petroleum Company, et al. v. Federal Power Commission. F.2d (10th Cir. Nos. 71-1659, et al., decided February 20, 1973).

[12] "Notice of Proposed Rulemaking and Order Prescribing Procedures," Docket No. R-389-B, issued April 11, 1973, 38 F.Reg. 10014, mimeo, p. 11: "We intend to issue an order on the merits in this proceeding by July 1, 1973."

[13] Order Nos. 455 and 455-A, supra, reproduced as Appendix A and Appendix B, infra.

reduction in later area rate proceedings, we answer by our foregoing acknowledgment of the supremacy of Section 5 over our administrative regulations and determinations. We cannot bind a future Commission not to invoke the prospective operation of Section 5, nor do we attempt to do so. We do, however, announce our policy to examine the justness and reasonableness of proposed rates in Section 7 proceedings instituted under this Section, thus avoiding the uncertainty of reserving rate determinations for subsequent Section 4 or Section 5 action. *To the extent that this Commission can grant certainty of rates, we do so.* Congressional enactment of sanctity of contract legislation is essential to assure that contracts dedicating new supplies to interstate markets will not be abrogated by future commissions."[14]

The Commission thus stated that its optional procedure, premised on a determination after a hearing that the proposed contract rates are just and reasonable, is as far as it can go in granting sanctity of prices in producer contracts. Clearly sanctity of contract rates cannot lawfully be achieved under the Act by abandoning the statutory "just and reasonable" standard as the Commission attempted to do in the Orders which the Court below set aside.

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[14]Order No. 455, mimeo, pp. 9-10, emphasis supplied (infra, Appendix A, p. 10).

CONCLUSION

In light of the foregoing, it is submitted that the decision of the Court of Appeals is correct in that there are no reasons warranting grant of *certiorari* by this Court. Accordingly, the petitions for a writ of *certiorari* should be denied.

Respectfully submitted,

Kenneth Heady
John L. Williford
Frank Phillips Building
Bartlesville, Oklahoma 74003

*Charles E. McGee
John T. Ketcham
Robert J. Haggerty
McGee & Ketcham
1145 Nineteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Respondent
Phillips Petroleum Company
(**Counsel of record*)

June 1, 1973